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No. 04-848

In the Supreme Court of the United States

BARBARA DOLAN, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a cause of action for personal injury resulting from the negligent delivery of mail is a claim "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" that, under 28 U.S.C. 2680(b), is excepted from the government's waiver of sovereign immunity in the Federal Tort Claims Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-20a) is reported at 377 F.3d 285. The opinion of the district court (Pet. App. 1a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2004. The petition for a writ of certiorari was filed on November 1, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. According to the allegations in the complaint in this case, on August 25, 2001, petitioner fell over letters, packages, and periodicals that had been placed on her porch by a United States Postal Service (USPS) employee who was delivering mail to her house. As a result of her fall, petitioner suffered physical injury and

her husband suffered a loss of consortium. Petitioner and her husband subsequently filed a complaint under the Federal Tort Claims Act (FTCA) against the United States and USPS.* The government moved to dismiss the case on the ground that the court lacked jurisdiction; the government argued that the suit fell within 28 U.S.C. 2680(b), which excepts "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" from the FTCA's waiver of sovereign immunity. Pet. App. 1a-3a, 15a-16a.

2. The district court granted the government's motion and dismissed the complaint. Pet. App. 1a-13a. The court observed that whether petitioner's suit is barred turns on the meaning of "negligent transmission" as it is used in 28 U.S.C. 2680(b). Pet. App. 5a. Examining dictionary definitions of the term "transmission," the court concluded that the term, "[i]n the context of delivering letters or postal matter," means "the process of conveying [letters] from one person or place to another [that] starts when the USPS receives the letter or postal matter and ends when the USPS delivers the letter or postal matter." *Id.* at 5a-6a. In light of this definition, the court explained, "[n]egligently placing mail on a porch" falls "squarely within the plain meaning of 'negligent transmission' as that term is used in Section 2680(b)," because the "[t]ransmission of the mail was not complete until the USPS employee placed the mail on the porch." *Id.* at 6a.

The court rejected petitioner's argument that Section 2680(b) should be read narrowly to encompass only claims for damage to mail itself, observing that "[t]here

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* Petitioner's husband has not petitioned this Court for review of the decision below.

is no indication that Congress intended 'negligent transmission' to be read more narrowly." Pet. App. 6a. In addition, the court reasoned that such a reading of Section 2680(b) is not "consistent with Congress's general purposes in creating FTCA exceptions"—to prevent disruption of government activity—because it would "threat[en]" to "disrupt[] the governmental activity of ensuring that * * * millions of pieces of mail * * * are delivered efficiently," and would "expose the United States to liability for excessive or fraudulent claims as there are likely to be no witnesses to observe the events after the completion of delivery." *Id.* at 8a-9a.

3. The court of appeals affirmed. Pet. App. 14a-20a. In the court of appeals' view, the "negligent transmission of letters or postal matter" described in Section 2680(b) is "the process of conveying from one person to another, starting when the USPS receives the letter or postal matter and ending when the USPS delivers the letter or postal matter." Pet. App. 20a. The court explained that reading "transmission" to include the placement of mail in the course of delivery at its destination is consistent with Section 2680(b)'s generally "expansive language." *Id.* at 19a. The court noted in this regard that Congress's use of "[t]he phrase '[a]ny claim arising out of'" such conduct in Section 2680(b) "evinces Congress's intent to broaden rather than limit the exception." *Ibid.*

In addition, Section 2680(b)'s legislative history, the court observed, makes "plain that Congress intended to protect the government from lawsuits that might be generated by the unavoidable mishaps incident to the ordinary accepted operations of delivering millions of packages and letters each year." Pet. App. 19a. In the court's view, it was "hard to imagine a more ordinary

accepted operation incident to delivering millions of packages and letters each year than the ultimate act of delivery by USPS employees." *Ibid.* Here, the court continued, petitioner's accident "was incidental to the USPS employee placing the mail on the porch. Because USPS employees do not monitor how the mail they deliver is retrieved by third-parties, mishaps related to the retrieval of the mail may be unavoidable." *Id.* at 20a. Finally, "[t]o the extent that 'negligent transmission' is ambiguous at all," the court concluded that "ambiguities in the language of a purported waiver of sovereign immunity must be construed in favor of the government." *Ibid.* (citing *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)).

ARGUMENT

Petitioner contends (Pet. 15-16) that the court of appeals erred in holding that 28 U.S.C. 2680(b) bars claims under the Federal Tort Claims Act for personal injury allegedly caused by the negligent delivery of mail. In addition, petitioner argues that the decision below conflicts with a decision of the Second Circuit, *Raila* v. *United States*, 355 F.3d 118 (2004), which held that Section 2680(b) encompasses only claims for damage to mail itself. Pet. 11-15. The court of appeals, however, correctly interpreted Section 2680(b), and any narrow and nascent conflict between the decision below and *Raila* does not merit this Court's intervention. Accordingly, further review by this Court is not warranted.

1. The court of appeals correctly concluded that Section 2680(b) bars claims against the United States for the negligent placement of mail during delivery. Although petitioner faults the court of appeals for focus-

ing on the text of the exception and "bas[ing] its decision on a narrow definition of the term 'transmission'" (Pet. 15), this Court has observed with respect to the FTCA that "[t]he starting point" of any analysis "of * * * competing interpretations must, of course, be the language of [Section 2680]," because "the legislative purpose is expressed by the ordinary meaning of the words used." *Kosak* v. *United States*, 465 U.S. 848, 853 (1984) (internal quotation marks and citation omitted).

Section 2680(b) provides that the waiver of the United States' sovereign immunity under the FTCA does not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b). The term "transmission" is commonly understood to mean the "act, process or instance of transmitting," *Webster's Ninth New Collegiate Dictionary* 1254 (1987), and to "transmit," in turn, is understood to mean "to send or transfer (a thing) from one person or place to another," *Black's Law Dictionary* 1505 (7th ed. 1999).

As the court of appeals correctly observed, in the context of the delivery of mail, the "transmission of letters or postal matter" reasonably encompasses the placement of mail on the addressee's porch or in the addressee's mailbox. See Pet. App. 19a. That activity is part and parcel of USPS's function in conveying mail and is a unique aspect of postal service. Indeed, "it is hard to imagine a more ordinary accepted operation incident to delivering millions of packages and letters each year than the ultimate act of delivery by USPS employees." *Ibid.* For this reason, reading Section 2680(b) narrowly, to exclude claims for negligent delivery, would fail to protect the core delivery function of

the USPS, which Congress clearly meant to safeguard. See *ibid*.

Petitioner has not pointed to, and cannot point to, anything in the text of Section 2680(b) to support her argument that the exception narrowly applies only to claims for mishandled mail or damage to the mailed material itself, and not to claims for personal injury due to negligent mail delivery. To the contrary, as the court of appeals pointed out (Pet. App. 19a), Section 2680(b) applies to "[a]ny claim arising out of" negligent transmission, which manifests an intent to broaden, not narrow, the reach of the exception.

Petitioner's reliance on dictum in *Kosak* (Pet. 15-16) for the proposition that Section 2680(b) cannot be read to insulate USPS from delivery-related claims is misplaced. In *Kosak*, this Court suggested only that Section 2680(b) was more limited than other exceptions in Section 2680, and would not bar suits for activities that do not directly involve negligent handling of the mail itself, such as the negligent handling of a USPS delivery truck. See 465 U.S. at 855. This Court has never suggested that Section 2680(b) does not apply to claims that arise directly from the handling of the mail itself as part of the USPS's core mail-delivery activities.

There is, moreover, nothing unique to USPS or to the performance of postal services about driving a vehicle. By contrast, the actual placement of the mail to accomplish its delivery *is* a function unique to the performance of postal services. Application of the exception in Section 2680(b) to such conduct therefore comports with its purpose of protecting from tort litigation the ordinary functions of handling billions of pieces of mail each year in the vast USPS operation. See Pet. App. 19a.

2. In addition, the nascent and narrow split of authority petitioner identifies does not merit this Court's review. Only one circuit, besides the court of appeals in the decision below, has even considered whether the exception to the FTCA's waiver of sovereign immunity set out in Section 2680(b) applies to negligent placement of mail during its delivery. In *Raila* v. *United States*, 355 F.3d 118 (2004), the Second Circuit held that Section 2680(b) applies only to claims for "damages and delay of the postal material itself and consequential damages therefrom" and not damages "that result from a slip and fall on a package that was left in the wrong place." *Id*. at 121.

That narrow conflict does not merit this Court's review at this time. In neither *Raila* nor the case at hand did the parties seek rehearing en banc. In light of the nascency of the circuit conflict—the conflicting decisions were issued only months apart last year—and the absence of any petition for rehearing en banc in this case or *Raila*, the courts of appeals retain the ability to harmonize the circuit precedents and eliminate the conflict by sitting en banc.

Permitting further percolation of the question presented is particularly called for in this case, because the Second Circuit did not address the argument that the placement of mail on a porch or in a mailbox differs from activities like driving a mail truck in that the former is a core postal activity and is unique to the postal function. Further consideration by the courts of appeals of that argument could resolve the conflict of authority and provide additional analysis that could benefit this Court if review became warranted at a later date.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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